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Before the
Federal Communications Commission
Washington DC 20054

OCT - 9 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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)
Inquiry Concerning the Deployment of)
Advanced Telecommunications)
Capability to All Americans in a Reasonable)
and Timely Fashion, and Possible Steps)
to Accelerate Such Deployment)
Pursuant to Section 706 of the)
Telecommunications Act of 1996)

CC Docket No. 98-146

REPLY COMMENTS OF VELOCITA CORPORATION

INTRODUCTION AND SUMMARY

Velocita Corporation, respectfully submits these Reply Comments in response to the Commission's above-captioned Notice of Inquiry ("NOI"), for the purpose of endorsing and reinforcing the comments of other competitive telecommunications providers who have described to the Commission the abuses of local, state, and federal rights-of-way management authorities. Velocita, a broadband network provider, which is in the process of deploying its 19,000-mile nationwide state-of-the art telecommunications network, considers the difficulty in obtaining access to public rights-of-way to be one of the most significant barriers to entry for competitive network providers. For that reason, Velocity hereby adds its voice to the chorus urging prompt and decisive action by the Commission to address the pervasive and crippling barriers to competitive market entry posed by unreasonable and unlawful rights-of-way management practices and policies. Like commenters Adelphia Business Solutions, Multimedia Fiber Network Services, Global Photon Systems, Global Crossing, and Qwest, Velocita, too, has

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experienced chronic, widespread, and extremely costly intransigence on the part of rights-of-way management authorities that impose protracted, arbitrary, and overreaching procedures for gaining permission to access public rights-of-way. Furthermore, like its fellow commenters, Velocita frequently has experienced demands for unreasonable and unlawful compensation, waivers of its legal rights, restrictions on use of its facilities, and other concessions as a condition of gaining access to the public rights-of-way that are critical for the installation and deployment of its nationwide telecommunications network. For these reasons, and so that the mandates of the 1996 Telecommunications Act¹ may be fulfilled, Velocita respectfully requests that the Commission undertake the actions recommended by the commenters in this proceeding to clarify the scope of federal, state, and local rights-of-way management authority, define the terms of access that rights-of-way managers may properly impose upon telecommunications providers, and create meaningful and timely enforcement mechanisms to compel rights-of-way managers' compliance with federal law.

**THE IMPORTANCE OF ACCESS TO PUBLIC RIGHTS-OF-WAY FOR THE
DEPLOYMENT OF ADVANCED SERVICES**

It is obvious and yet so important as to merit reiteration: access to public rights-of-way is essential to the deployment of the infrastructure required to deliver the advanced telecommunications services that are the subject of this NOI. As Congress clearly recognized in the 1996 Act, without access to public rights-of-way on non-discriminatory and competitively neutral terms, subject only to "fair and reasonable"² compensation and the need of state and local authorities to impose regulations necessary

¹ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) ("1996 Act").

² Section 253(c) of the 1996 Act, 47 U.S.C. § 253(c).

for management of those rights-of-way, the promise of telecommunications competition cannot be realized. Indeed, the current market downturn brutally illustrates what Congress already knew – absent meaningful, cost-effective opportunities to rapidly deploy the infrastructure needed to provide services that will generate a return on investment, the capital required to create a robust national competitive telecommunications market will evaporate. The spate of recent bankruptcies and, perhaps even more importantly, the dramatic slowdown in the breadth and pace of new infrastructure deployment despite continuing strong demand for advanced services, only serves to illustrate the point. Prompt and decisive Commission action to remove the rights-of-way-related barriers to market entry that are deterring investment in new infrastructure must occur, if the deployment of advanced services is to continue “in a reasonable and timely fashion.”³

RIGHTS-OF-WAY RELATED BARRIERS TO MARKET ENTRY

Velocita is deploying a 19,000 mile nationwide network that traverses over 28 states providing access to more than 50 major metropolitan areas, including the five largest telecommunications markets in the United States, as well as important Tier 2 and 3 cities and many local jurisdictions.⁴ As the company’s network deployment plan contemplates nationwide construction across many rural and urban jurisdictions, Velocita has experienced virtually all of the impediments to access to public rights-of-way as

³ See Section 706 of the 1996 Act, 47 U.S.C. §157 note (“In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission’s determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”).

⁴ When completed, it is anticipated that Velocita’s nationwide network will serve 175 metropolitan areas.

described by commenters Adelphia Business Solutions (“ABS”), Multimedia Fiber Network Services (“MFN”), Global Photon Systems (“GPS”), Global Crossing (“GC”), and Qwest. Specifically, Velocita shares these commenters concerns⁵ regarding:

- **Prolonged, uncertain, and overburdensome application procedures.** The experiences ABS recounts having had in Oldsmar, Florida; Culver City, Emeryville, and Redwood City, California; and Bristol, Virginia, all resonate with Velocita’s own experiences, as do those of GC in the San Diego area, and GPS, which speaks of a 2 ½ year delay in one instance, requiring intervention by the governor of the state. Despite strong court precedent concluding that Section 253⁶ does not allow localities to condition rights-of-way access upon review of financial, technical, and legal qualifications already regulated at the state and federal level, many localities still require that Velocita persuade them of the company’s financial and technical wherewithal, before they will even process the company’s application to enter the public rights-of-way. Moreover, application requirements are inconsistent from one jurisdiction to the next, and, in jurisdictions without any established application procedure, the process is wholly

⁵ Like many of the commenters, Velocita is reluctant at this time to identify by name jurisdictions and agencies that have imposed unlawful and unreasonable barriers to rights-of-way access, because Velocita, in many instances, still is negotiating for rights-of-way access or must obtain additional permits in order to complete its construction, and fears that adverse comments may cause the offending jurisdictions to impose additional delay and obstruction. However, Velocita can attest that the experiences recounted by the other commenters in this proceeding echo its own, and is prepared to provide Commission staff with specific examples, under appropriate confidentiality protections.

⁶ Section 253 of the 1996 Act, 47 U.S.C. §253.

within the discretion of local decision makers, who may delay for months or even years while ostensibly deciding how to proceed.⁷

- **Arbitrary standards for granting rights-of-way access.** The unfettered discretion that plagues the application process often carries over to the manner in which local authorities decide whether or not to grant rights-of-way access to a provider. ABS's experience in Shreveport, Louisiana, and Qwest's experience with the deference given to individual homeowners in the siting of DSL cabinets are indicative of the types of arbitrary and ill-defined local standards that Velocita, too, has faced.

- **Unreasonable demands for excessive monetary and in-kind compensation.** Too often, rights-of-way management authorities exercise their discretion to delay an application for rights-of-way access as a means of pressuring the provider to acquiesce to unreasonable demands for monetary and in-kind compensation. MFN cites its experiences with Dearborn, MI, and Carrollton, Texas, as examples of the fact that localities continue to view rights-of-way access as a revenue-generating opportunity, notwithstanding state and federal law to the contrary. GC identifies unreasonable demands for compensation made by jurisdictions in the San Diego area, and in Suffolk County, NY, while GPS cites its experience in the Los Angeles Basin and Central California Coast. Qwest also cites excessive compensation demands as a pervasive problem. Like these commenters, Velocita has repeatedly experienced unreasonable compensation demands from

⁷ For example, in one recent instance, at a Council meeting on the required proposed ordinance granting Velocita access to local public rights-of-way, a Council member who was disgruntled with previous providers' trenching of local streets suggested that perhaps, if the Council delayed long enough and made the process difficult enough, Velocita would choose not to go through the city.

jurisdictions that know too well that rights-of-way is a one-of-a-kind commodity, essential to Velocita, over which the jurisdiction has monopoly control.

Although, in the past, Velocita has sometimes acceded to unreasonable demands in an effort to maintain speed to market, under current market conditions it is no longer viable to accept unlawful compensation terms in consideration of prompt access, with the consequence that Velocita has reached impasse in some jurisdictions where it has refused to accept extortionate compensation terms. The examples given by GC and GPS with respect to compensation demanded by NOAA illustrate that even federal agencies are guilty of abusing their monopoly control over necessary rights-of-way to profit at the expense of competitive telecommunications providers and their customers.

- **Undue restrictions on the categories of providers and types of facilities allowed to use the public rights-of-way under municipal ordinances and agreements.** A problem that Velocita believes is growing, as localities become increasingly sophisticated in their efforts to sidestep the state and federal limitations imposed upon the scope of their regulatory authority, has been the application of narrow and unnecessarily exclusionary definitions of the categories of telecommunications providers (1) that may obtain access to public rights-of-way on non-discriminatory and competitively neutral terms, and (2) to whom facilities in the rights-of-way may be made available. MFN cites as an example of this phenomenon the case of Berkeley, California, which apparently has amended its rights-of-way ordinance to capture all but “common carriers” – the one category of provider that the federal court definitively said could not be

subjected to the city's most onerous franchise requirements. GPS notes that the California State Lands Commission similarly has attempted to limit the rights afforded under its agreement to the narrowest arguably required under the state law, which references only "telephone corporations" and, because of its vintage, does not address existing and future competitive service offerings beyond traditional "telephone" services. Velocita frequently encounters rights-of-way authorities who believe that, because the facilities to be constructed are for pass-through purposes and Velocita will not be providing local dialtone service, they are entitled to treat Velocita completely differently (and less favorably) than they do the incumbent local exchange provider. Moreover, although Velocita is a major provider of wholesale infrastructure to other certificated telecommunications providers, including AT&T, localities often condition their grant of rights-of-way access on the proviso that any transfer or disposition of Velocita's conduit and fiber – even to another telecom provider – is subject to the jurisdiction's wholly discretionary review and approval. Such actions create an untenable barrier to timely and cost-competitive market entry both for Velocita and for its carrier customers.

- **Demands that the competitive provider waive its legal rights under state and federal law.** Perhaps because public rights-of-way management authorities recognize that the policies and practices cited above exceed their authority under state and federal law, it has become commonplace for jurisdictions to condition rights-of-way access on the unconscionable demand that Velocita agree to waive its rights under state and federal law. Even court precedent on this issue seems

unpersuasive to rights-of-way management authorities, who treat most issues under Section 253 as “unsettled” unless a court in their own jurisdiction has ruled definitively on the specific term at issue. All of the commenters referenced above have now identified this as a pervasive problem requiring Commission action, with its nationwide reach, and with GC and GPS having cited specific, concrete examples of the practice, surely the Commission has the evidence it needs to address this issue.

- **Lack of coordination among adjacent rights-of-way authorities.** GC and GPS both note a problem that all competitive infrastructure providers face – that of having to negotiate separate agreements with multiple and sometimes overlapping rights-of-way authorities. GC cites the example of NOAA and the Washington Department of Natural Resources in Puget Sound; GPS discusses the multiple authorities with which it has had to deal in the Los Angeles Basin and Central California Coast. Velocita, too, has been delayed and incurred additional expense as a consequence of having to deal with multiple layers of rights-of-way authorities to accomplish a single build. For example, Velocita currently is having difficulty obtaining authority to construct in a major East Coast city because it cannot obtain a commitment from the State highway department that its preferred route into the City will be approved. Greater coordination among jurisdictions, and expedited dispute resolution mechanisms and sanctions for undue delay, would greatly reduce this barrier to facilities construction.

RECOMMENDED FCC ACTIONS TO REDUCE RIGHTS-OF-WAY RELATED BARRIERS

To remedy these impediments to the cost-effective, competitively viable deployment of the infrastructure required to provide Americans with reasonable and timely access to advanced telecommunications capability, Velocita endorses the following recommended actions by the Commission:

- **Report to Congress in this NOI.** The Commission should use the current NOI as a vehicle to report to Congress on the rights-of-way access problems now facing the competitive industry, and on the need to clarify the scope of state and local rights-of-way management authority under Section 253(c), the need to expand Section 253 to definitively cover the full range of telecommunications providers contributing to the deployment of advanced services, including wholesale infrastructure providers, and the need to include federal rights-of-way.
- **Report and propose rules under the auspices of the pending rights-of-way NOI.**⁸ The Commission should reactivate the rights-of-way NOI initiated in 1999, and develop regulations in response to the comments filed in that proceeding, the City Signal preemption petition cases,⁹ and this docket, that define the limits of state and local right-of-way management authority and provide meaningful enforcement mechanisms. Velocita concurs with ABS and GC that the Commission has existing authority to exercise its preemptive powers under 253(d) to prohibit state and local rights-of-way management practices that

⁸ See *Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees*, FCC 99-141 (rel. July 7, 1999), issued in *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, *Notice of Proposed Rulemaking and Notice of Inquiry* in WT Docket No. 99-217, and *Third Further Notice of Proposed Rulemaking* in CC Docket No. 96-98, 14 FCC Rcd. 12,712-19 ¶¶ 70-85 (1999).

⁹ CS Docket Nos. 00-253 and 00-255.

are at odds with Section 253(a) and (c). While Congressional amendment of Section 253 to clarify and expand its scope may be desirable, Velocita agrees with other commenters that the Commission clearly has current authority under Sections 253 and 706 to act in the pending City Signal preemption petition cases, and to provide guidance:

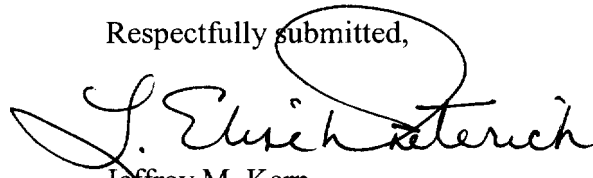
- clarifying that fees in excess of regulatory costs, in-kind compensation, waiver of rights, and the arbitrary exercise of discretion in granting rights-of-way access, all are prohibited;
 - identifying 60 days as the time frames within which requests for rights-of-way access ordinarily should be granted; and
 - providing for expedited dispute resolution procedures and sanctions against jurisdictions that persist in violating the law.
- **Clarify that all telecommunications providers – including wholesale infrastructure providers – are entitled to non-discriminatory, competitively neutral rights-of-way.** Velocita particularly urges the Commission to address the issue, mentioned above, that is increasing in prominence and that several commenters have described: the need to clarify that all competitive telecommunications providers, including “carriers’ carriers,” are entitled to access to public rights-of-way on non-discriminatory and competitively neutral terms. Without this, the deployment of advanced services to all Americans cannot proceed in a reasonable and timely manner. So long as local rights-of-way management authorities persist in exercising discretionary micro-management over who may and may not construct and operate the facilities necessary to

provide competitive telecommunications services, and the transfer of fiber and conduit by infrastructure providers to carriers is delayed and impeded, the deployment of advanced services will suffer.

CONCLUSION

The time for decisive Commission action is now. The record in this NOI proceeding, the pending City Signal preemption petition dockets, and the 1999 rights-of-way NOI provide ample support for Commission action pursuant to the authority provided by Congress in Sections 253 and 706 of the 1996 Act. Velocita respectfully urges the Commission's prompt action to promote continued, viable competition in the deployment of advanced services infrastructure, through implementation of the recommendations described above.

Respectfully submitted,



Jeffrey M. Karp
L. Elise Dieterich

Counsel for Velocita Corporation

Dated: October 9, 2001

CERTIFICATE OF SERVICE

I hereby certify that Reply Comments of Velocita Corp. were served by hand on this 9th day of October, 2001, as indicated below.

Magalie Roman Salas, Secretary (**Original + 4 copies**)
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Room TW B-204
Washington, D.C. 20554

Ellen Blackler **(2 copies + diskette)**
Special Assistant to the Bureau Chief
Federal Communications Commission
Common Carrier Bureau
445 12th Street, S.W. – Room 5-C413
Washington, D.C. 20554

FCC Reference Information Center **(1 copy)**
Federal Communications Commission
445 12th Street, S.W.
Suite CY-A257
Washington, D.C. 20554



L. Elise Dieterich

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